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Sovereignty and Tragedy in Contemporary Critiques of Investor State Dispute Settlement

Paul Robert Gilbert

What happens to sovereign power as it drains away from
the modern state, to the extent that it does drain away?
When it flows out of the nation-state, does it flow into
some other container?

– Joan Cocks, *On sovereignty and other political delusions*,
Bloomsbury (2014), 26

A. Introduction

Investor-state dispute settlement (ISDS), which makes it possible for foreign investors to sue host states in arbitral tribunals, has been at the centre of recent mobilisations against claimed trade injustices.¹ Critics tend to identify ISDS as epitomising neoliberalism or neo-imperialism in international law, or as a hybrid of these two. My intention in this essay is not to undermine such critiques but rather to examine the work that the concept of sovereignty does within them and to consider the possible tragic quality of proposals that point towards political action focused on reclaiming sovereignty. I argue that, when critiques of ISDS are couched in terms of sovereignty lost by states to corporations, critics find themselves implicitly working with ‘two types of sovereign power: a “bad”, dominative type...and a “good” emancipatory type’.² When corporate sovereignty is depicted as a ‘bad’ dominative type, it is often implied that, if returned to states (or communities) sovereignty would function as the ‘good’, emancipatory type. And yet, as Joan Cocks observes, struggles for freedom through sovereignty can be dangerous, frequently recreating the injuries they seek to escape.³ But we can go further and ask not only about the salience of the concept of sovereignty for critiques of ISDS and international investment law, but also about the

¹See M-B Dembour & N Stammers ‘Introduction’ *London Review of International Law*, this issue.

² J Cocks *On Sovereignty and Other Political Delusions* (Bloomsbury, 2014) 40.

³ Ibid 10.

temporal mismatch between critiques that appear to respond to historical, anti-colonial concerns about sovereignty, and the coordinates of our own contemporary problem-space.⁴

The essay proceeds by, firstly, providing some background to my conceptual orientation. It then goes on, secondly, to examine the particular place that sovereignty occupies in existing critiques of ISDS and international investment law. The third section draws on ethnographic fieldwork carried out with lawyers and activists in Bangladesh, who are concerned with the treatment of Bangladesh in a number of ISDS cases brought by transnational oil, gas and mining companies. Arguably, the violent treatment of protestors by the Bangladeshi state highlights the fatal flaw involved in critiquing ISDS on the basis of sovereignty loss or erosion. In the final section, I move to London in 2016, where campaigns against the Transatlantic Trade and Investment Partnership (TTIP) couched in terms of a loss of sovereignty to transnational corporations rubbed uncomfortably up against efforts to regain sovereignty via the Brexit vote. The conclusion argues for a more timely critique of ISDS and international investment law; one that avoids echoing regressive ‘post-neoliberal’ politics, or equating post-colonial sovereignty with decolonisation and emancipation.

B. Conceptual Background

My arguments in this essay are inspired by an emerging body of work in postcolonial studies, anthropology and international law which grapples with the relationship between the temporal context in which critique is articulated, and the forms of expectation those critiques nourish and engender.⁵ David Scott reminds us that colonialism was pictured by early anti-colonial writers and politicians as a totalising system of degradation and thus only ‘a sharp expression of the anticolonial demand—the unequivocal demand for immediate sovereignty’—could satisfy the requirements of critique in the interwar and post-WWII years.⁶ Scott argues that revolutionary anticolonial tracts demanding sovereignty as

⁴ D Scott *Conscripts of Modernity: The Tragedy of Colonial Enlightenment* (Duke, 2004) 79.

⁵ See especially D Scott *Omens of Adversity: Tragedy, Time, Memory, Justice* (Duke, 2014); G Wilde *Freedom Time: Negritude, Decolonization, and the Future of the World* (Duke, 2015); and most recently S Pahuja ‘Letters from Bandung: Encounters with Another International Law’ in L Eslava, M Fakhri and V Nesi (eds) *Bandung, Global History and International Law: Critical Past and Pending Futures* (Cambridge, 2017).

⁶ Scott (2004) 95.

vindication could once have been read as romantic, offering as they did a narrative of overcoming and redemption. Yet such critiques now appear ‘untimely’ insofar as ‘revolutionary anticolonialism’s dream of national sovereignty [has become] a historically superseded and politically obsolete future past’ and, therefore, ‘can no longer meaningfully animate emancipatory projects in our radically transformed conditions’.⁷ In other words, critiques which culminate in a demand for the realisation of sovereignty appear exhausted-out of step with a present in which post-colonial sovereignty is a fragmented achievement rather than an emancipatory promise, and no longer able to point towards revolutionary political projects. It is in this sense, for Scott, that such critiques have also taken on a tragic character. I suggest in this essay that the same holds true for scholars who present international investment law as neo-imperial, and critique ISDS on the basis that such mechanisms precipitate a loss of sovereignty for contemporary postcolonial states.

In a similar manner, critiques couched in terms of neoliberal governance can also take on a tragic aspect. To the extent that critiques of ISDS as neoliberal identify the excess sovereignty of markets or corporations as the problem, a resurgent popular or state sovereignty often becomes the answer that this critique demands. When critical legal scholars root their analyses of neoliberalism in Foucault, who ‘does not quite manage to escape its ideal-typical definition as, most notably, a politics inclined towards deterritorialisation’,⁸ it is *re-territorialisation*, or in Polanyian terms ‘re-embedding’ in the ‘sovereign dynamics’ of land and community,⁹ that presents itself as the answer to the critique of ISDS. The mode of politics, often referred to as populist but also increasingly referred to as post-neoliberal, now characterises the putative neoliberal heartlands of Britain and the USA and has already exposed the violence encoded by explicit calls to re-enchant an economistic national politics through the reassertion of sovereignty.

Polanyi’s embeddedness concept has been put to a range of uses by international lawyers and other social scientists, and this diversity of application can at least in part be attributed

⁷ G Wilde (2015) 15, 37.

⁸ A Mitropoulos *Contract and Contagion: From Biopolitics to Oikonomia* (Minor Compositions, 2012) 136.

⁹ Ibid 158.

to Polanyi's own inconsistent and constantly evolving use of the term.¹⁰ One common interpretation of Polanyi's *The Great Transformation* is that, rather than critiquing the operation of the dis-embedded self-regulating market (or market society) itself, Polanyi's target was the ideology of market fundamentalism,¹¹ since any economic activity (even that of the market society) must always be embedded in a wider set of social institutions.¹² Closely tied to Polanyi's critique of the dis-embedded market was his notion of the double movement, whereby the subjugation of society to the laws of the market (including the creeping commodification of land and labour) triggers a 'spontaneous reaction of "social protection"'.¹³ Discourse on the double movement has been reinvigorated following the 2008 financial crisis, as comparisons are drawn between the dis-embedding or de-territorialising advance of neoliberal market society and the time period that concerned Polanyi: nineteenth-century Britain. My concern in this essay, however, is not with the explicit mobilisation of Polanyian analysis or the use of the idea of double movement by critics of international investment law. Rather, it is with the Polanyian form that these critiques take, in which 'capital and the state are regarded as distinctive logics, the first inclined to overtake limits, the second emphasising limit as such', and where 'there is a more or less tacit argument which construes family, race and/or nation as a sanctuary from the abstracting violence of the transactional'.¹⁴ Hence, critiques of ISDS as neoliberal, which point towards a wresting of sovereignty from the market, do not provide an adequate response to a present, in which the deep 'embedding' of market forces in supposedly

¹⁰ G Dale 'Lineages of embeddedness: on the antecedents and successors of a Polanyian concept' 70 *The American Journal of Economics & Sociology* 306, 320. Dale notes that while limited reference was made to 'embeddedness' in Polanyi's major work *The Great Transformation*, repeated references to embeddedness—drawing on a range of influences from German Historical School, American Institutionalists and British Social Anthropology—appear in Polanyi's notes and manuscripts. See K Polanyi *The Great Transformation* (Beacon Press, 1957). The wide range of approaches to 'embeddedness' Dale refers to can be discerned in the work of individual legal scholars. See A Perry-Kessaris 'Reading the story of law and embeddedness through a community lens: a Polanyi-meets-Cotterrell economic sociology of law' 62 *Northern Ireland Legal Quarterly* (2011) 401, 404; A Perry-Kessaris 'Prepare your indicators: economics imperialism on the shores of law and development' 7 *International Journal of Law in Context* (2011) 401, 408.

¹¹ K Hart & C Hann 'Introduction: learning from Polanyi', in C Hann & K Hart (eds.), *The Great Transformation Today* (Cambridge UP, 2009) 1, 9; S Lakshminarayan 'Market fundamentalism in the age of "haute finance": the enclosing of policy space in "emerging" India' 17 *ephemera* (2017) 849, 852.

¹² See Perry-Kessaris (2011) 'Prepare your indicators' 417

¹³ G Dale 'Double movements and pendular forces: Polanyian perspectives on the neoliberal age' 60 *Current Sociology* (2012) 3, 7.

¹⁴ A Mitropoulos 'Proliferating limits: the *oikonomic* limits of capitalist dynamics and technologies of the border' in J Hutnyk (ed.) *Beyond Borders* (Pavement Books, 2012).

contemporary sovereign nation-states actually serves ‘as [the] bedrock for neoliberalism’ even though it ‘curiously remains intact’ as a desired alternative for its ‘ostensible critics’.¹⁵

There is, thus, a tragic untimely quality to critiques of ISDS as neoliberal *and* those of ISDS as neo-imperial, both of which point towards the reclamation of sovereignty. What, as James Sidaway asks, can calls for more sovereignty be expected to produce when putatively failed states—crippled by long histories of colonial extraction and ravaged further by the corporate beneficiaries of a neoliberal international investment law—seem, on closer inspection, to be beset by an excess or surplus of sovereignty?¹⁶ I discuss this further below in the context of Bangladesh. The economic and territorial fragmentation of postcolonial jurisdictions, bisected by an excess of extractive corporate endeavours and state institutions claiming authority over decision-making and the authority over life and death, gives the lie to any easy notion that there is a welcoming sovereign ground in which such economic activity might easily be re-embedded. Critiques of existing ISDS arrangements (whether they are framed as neoliberal or neo-imperial) that point towards reclaimed or re-sited sovereignty as an emancipatory horizon take on a tragic aspect to the extent that they do not adequately respond to, nor point beyond, the broken promises and sovereign excesses of the postcolonial present.

At this point, given the many and varied ways in which sovereignty is used as an analytical term -and as a formal concept in international law- it is vital to account for the diversity of meanings that might be attributed to sovereignty by the authors under discussion, and to clarify the sense in which I approach sovereignty in my own analysis. Firstly, there is the question of siting sovereignty. For some authors, particularly those working in political geography, it is the territorial or scalar dimension of sovereign authority that receives the most considered attention. Whether sovereignty is understood to reside in the ‘general will’ of a people, or in a nation-state as the institutionalisation of that will, increasingly, emphasis is increasingly placed on the ‘multiple and layered forms of sovereignty’ that

¹⁵ A Mitropoulos ‘Uncanny robots and affective labour in the oikonomia’ 18 *Cultural Studies Review* (2012) 153, 159.

¹⁶ J Sidaway ‘Sovereign Excesses? Portraying Postcolonial Sovereigntyscapes’ 22 *Political Geography* (2003) 157, 160.

transect, encompass, and reside within the nation-state.¹⁷ Secondly, there is the question of the substance of sovereignty, and the related methodological question of how (and where) it is to be discovered. Political theorists may begin with a conceptual composite drawn from the canon of Western political theory, which takes sovereignty to be made up of territory, supremacy, perpetuity, absoluteness and decisionism, and seek out its expression in the contemporary world.¹⁸ Others are less concerned with the nature of sovereignty as an ontological constant than with the historical emergence of sovereignty as a particular 'institutional and discursive framework through which we understand legal regimes.'¹⁹ It is here that most work in the postcolonial critique of international law can be located, concerned as it is with differential recognition of formal sovereign authority under international law.

C. Sovereignty in critiques of ISDS as 'neoliberal' or 'neoimperial'

Neoliberalism is among the most contested of terms in use in the contemporary social sciences, with scholars in different traditions treating neoliberalism variously as: a mode of governmentality; a set of institutional changes; or a project for the restoration of class power.²⁰ While some scholars seek to explain neoliberal formations in terms of the principles 'articulated in canonical urtexts' produced by neoliberal thinkers like Hayek and Friedman,²¹ others concern themselves with the distinct forms of neoliberalism (or neoliberalisation) produced by the encounter between neoliberal thought and existing forms of governance in diverse spatial contexts. The frequent association of neoliberalism

¹⁷ T Hansen & F Stepputat 'Sovereignty revisited' 35 *Annual Review of Anthropology* 295, 309. See also Stephen Legg: "Multiscalar sovereignty encourages us to abandon 'methodological nationalism'...but we must remain aware that sovereignty amounts to the supreme authority within a territory." S Legg 'Of Scales, Networks and Assemblages: The League of Nations apparatus and the Scalar Sovereignty of the Government of India' 32 *Transactions of the Institute of British Geography* (2009) 234, 240.

¹⁸ See W Brown *Walled States, Waning Sovereignty* (Zone, 2010), 21-22.

¹⁹ M Wachspress 'Rethinking Sovereignty with Reference to History and Anthropology' 5 *International Journal of Law in Context* (2009) 315, 317.

²⁰ K Birch 'Market vs. contract? The implications of contractual theories of corporate governance to the analysis of neoliberalism' 16 *ephemera* (2016) 107, 111-12.

²¹ R Venugopal 'Neoliberalism as concept' 44 *Economy and Society* (2015) 165, 166.

with de-regulation, small states and free markets²² has, however, created difficulties for those who wish to understand the exercise of sovereign power in neoliberal contexts. Where is political agency located if the state simply steps back to allow market rule?

Indeed, Kean Birch has recently challenged the notion that ‘neoliberalism is best thought of as a market-based order,’ given the extent to which monopolistic tendencies sit comfortably with putatively pro-market neoliberal thinkers (and policy-makers). Instead, Birch argues, it is ‘freedom to contract,’ and the concomitant proliferation of ready-made asymmetric contracts, that constitutes the true essence of neoliberalism.²³ There is a clear affinity here between the neoliberal emphasis on freedom to contract and the much-critiqued tendency for ISDS tribunals to treat states and corporations as equal and symmetrical parties to a contract with little regard for a state’s sovereignty or public responsibilities.²⁴ Similarly, Will Davies refocuses his historical sociology of neoliberalism away from the ‘logic of markets’ and towards the character of neoliberal authority.²⁵ Neoliberal thinkers have been repulsed by state planning, but they embrace the uncertainty of market outcomes. Hence the neoliberal state must effect a ‘disenchantment of politics by economics’ and exercise its sovereign authority by proliferating techniques for measuring and instantiating competition in diverse legal, social and cultural domains.²⁶ There is, to be sure, a relationship between the ‘neoliberal’ proliferation of measures of competition -which extend to competitions between nation-states, sometimes on the basis of the competitiveness of their economies-²⁷ and ISDS (see below).

Most critical engagements with the neoliberal dimensions of international investment law have, however, approached neoliberalism through Foucault’s writings on neoliberal

²² See Ran Hirschl on the ‘ubiquitous neoliberal, small-state social and economic world-view’ entailing a commitment to ‘[d]eregulation and privatization, free and “flexible” markets’ and ‘the removal of “market rigidities.”’ R Hirschl *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard UP, 2004) 151, 153.

²³ The neoliberal ‘focus on (nexus of) contracts meant that business organization—and hence corporate monopoly—could be cast as more efficient than the market where economies of scale led to reduced consumer prices’. Birch (2016) 108, 112.

²⁴ A Shalakany ‘Arbitration and the Third World: a plea for reassessing bias under the spectre of neoliberalism’ 41 *Harvard International Law Journal* (2000) 419, 422.

²⁵ W Davies *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (SAGE, 2014)

²⁶ Davies (2014) 4, 27-28; Perry-Kessaris (2011) 409.

²⁷ Davies (2014) 123.

governmentality.²⁸ For example, drawing on Foucault, David Schneiderman argues that neoliberalism forms the ‘backdrop of tradition and culture against which global legal debates ultimately should be evaluated.’²⁹ The proliferation of Bilateral Investment Treaties (BITs) providing for ISDS during the 1990s is taken by Schneiderman to be a reflection of the relationship between neoliberalism and political authority. Likewise, the increasingly expansive interpretation of what qualifies as an investment (and what qualifies as an expropriation) by the International Centre for the Settlement of Investment Disputes (ICSID) tribunals is treated as an example of globalised ‘neoliberal governmentality’, whereby the sovereign steps back or is disqualified from governing investors and economic rationality or private authority governs in their stead.³⁰ The purpose of Schneiderman’s critique is, he argues, ‘to identify and act upon fissures in transnational norms and forms in ways that will liberate states and citizens from the binding constraints of transnational legal strictures.’³¹ While there are certainly grounds to accept Schneiderman’s characterisation of ‘international investment law as an indicator of neo-liberal success’ (see below), equally there are reasons to be wary of what is demanded by critiques which frame neoliberalism as a ceding of sovereignty to the market. What does vindication call for in response to such critiques, if not a reclamation of popular or state sovereignty?

Neoliberalism—or the broadly neoliberal context of the 1990s—also serves an explanatory function for Enrique Prieto-Rios. For him, the proliferation of BITs during ‘what is widely considered to be the golden age of neoliberalism’ evidences the role of ‘neoliberalism as a hegemonic ideology.’³² Like Schneiderman, Prieto-Rios draws on Foucault to identify neoliberalism as an expansion of economic rationality that simply requires the state to uphold the rule of law for the ‘correct functioning of the market.’³³ At the centre of Prieto-

²⁸ T Lemke ‘Foucault, governmentality and critique’ 14 *Rethinking Marxism* (2002) 49.

²⁹ D Schneiderman ‘Constitutional property rights and elision of the transnational: Foucauldian misgivings’ 24 *Social & Legal Studies* (2015) 65, 69. See also Hirschl (2004) 153.

³⁰ Schneiderman (2015) 79.

³¹ Ibid 66-67.

³² E Prieto-Rios ‘Neoliberal market rationality: the driver of international investment law’ 3 *Birkbeck Law Review* (2016) 55, 59. As Jamie Peck notes, there are reasons to be suspicious of arguments that ‘explain with’ neoliberalism, figured as a broad temporal-political context. See J Peck ‘Explaining (with) neoliberalism’ *Territory, Politics, Governance* 1 (2013) 137. Such figurations dispense with *tracing* the social, documentary and institutional relations through which ‘neoliberal’ practices can be imagined to disseminate or scale themselves up.

³³ Prieto-Rios (2016) 66.

Rios' critique of international investment law is the extent to which BITs containing 'fair and equitable treatment' and 'most favoured nation' clauses require host states to give up their 'sovereign right to accept or reject any foreign investment' and provide the opportunity for investors to 'directly challenge sovereign decisions' through ISDS, without exhausting local remedies.³⁴ The way forward, for Prieto-Rios, involves directly challenging neoliberal ideology to ensure that communities affected by investment decisions receive the same *locus standi* as investors: replacing arbitral tribunals with an international court of investment; promoting expropriation insurance rather than BITs; and reconsidering the forgotten discussion on 'geo-economic sovereignty and self-determination in terms of natural resources'.³⁵

For Sornarajah, the neoliberal order that has enabled the proliferation of BITs containing ISDS provisions reiterates the same distinction between 'civilized' sovereign states and 'uncivilized' states (which only possess conditional sovereignty) that was made by imperial international law.³⁶ International investment law, and especially the norms of ISDS and BITs, reflects a 'climate of neoliberalism,' insofar as they 'benefit only multinational corporations from developed states'.³⁷ Furthermore, for Sornarajah, the premise that developing nations benefit from BITs is utterly fraudulent. Rather, 'host states *lose sovereignty* by unnecessarily entering into investment treaties'.³⁸ Sornarajah sees in recent decisions: the return of some of the principles of the New International Economic Order that make more room for regulatory expropriation; the hope for resurgent Third World Approaches to International Law (TWAIL); and a return to a diplomatic regime of investor protection.³⁹

The emphasis placed by Sornarajah, Prieto-Rios and, to a lesser extent, Schneiderman, on ISDS as an instrument which causes states to lose sovereignty is echoed in Van Harten's

³⁴ Ibid 71.

³⁵ Ibid 74.

³⁶ M Sornarajah 'On fighting for global justice: the role of a Third World international lawyer' 37 *Third World Quarterly* (1972) 1978.

³⁷ M Sornarajah 'International investment law as development law: the obsolescence of a fraudulent system' in M Bungenberg, C Hermann, M Krajewski & J Terhechte (eds) *European Yearbook of International Economic Law 2016* (Springer, 2016) 209, 212, 216.

³⁸ Ibid 210, emphasis added.

³⁹ M Sornarajah 'A justice-based regime for foreign investment protection and the counsel of the Osgoode Hall statement' 3 *Global Policy* (2012) 463, 465. For a view hostile to the return of diplomatic protection, drawing on the South African case, see Schlemmer (2016) 192.

view of ISDS as a ‘threat to democracy and sovereignty’,⁴⁰ and Peinhardt and Wellhausen’s (admittedly less critical) assertion that ISDS commitments as ‘limit[ing] a state’s sovereignty and transfer[ing] rights to foreign investors’.⁴¹ Enthusiastically pro-ISDS academics like Díez-Hochleitner and Remón, on the other hand, take arbitration to be the apogee of a distinctively *European* ‘culture of civility’, and envisage ‘an optimistic scenario for arbitration [whereby] the chronic evils of state jurisdiction appear even more visible to a sophisticated audience of merchants and entrepreneurs worried about concepts such as competence and efficiency’.⁴² As such, Díez-Hochleitner and Remón appear to provide evidence, from the other side so to speak, of Anthony Anghie’s argument that international investment law is ‘animated by the civilizing mission’ that draws a line between ‘civilized’ and ‘uncivilized’ jurisdiction, expelling the uncivilized other from the international order until they come to act in a civilized manner: granting metropolitan corporations the right to trade without impediment.⁴³

But are the discussions over geo-economic sovereignty and self-determination over natural resources to which Prieto-Rios refers simply forgotten, or are they, in Gary Wilde’s terms ‘untimely’?⁴⁴ There is perhaps reason to ‘cast some doubt on the continued usefulness of a discursive strategy in which political change is thought of in terms of a vindicationist narrative or liberation or a concept of revolution’, animated by ‘anti-colonial claims to self-determination and political sovereignty’.⁴⁵ Is neo-imperialism or neo-colonialism identical to neoliberalism, where international investment law is concerned? Is the answer to both to be found in reclaiming sovereignty? If so, we must think carefully about where sovereignty is to be wrested from, and where its final location might be. Without such consideration, critiques of ISDS are destined to take on tragic character, pointing towards desired futures (via ‘reclaimed sovereignty’) which already exist as the fragmented ground upon which neoliberal or neo-imperial investment law operates. In the next two sections of this essay, I

⁴⁰ Van Harten (2017) unpagued.

⁴¹ Peinhardt and Wellhausen (2016) 2.

⁴² J Díez-Hochleitner & J Remón ‘Dispute resolution systems and global markets: why arbitration?’ in V Pérez-Díaz (ed) *Markets and Civil Society: The European Experience in Comparative Perspective* (Oxford, 2014), 132.

⁴³ A Anghie ‘On critique and the other’ In A Orford (ed.) *International Law and its Others* (Oxford, 2006) 386, 394.

⁴⁴ Wilde (2015) 37.

⁴⁵ Scott (2004) 64-65.

outline two cases (one in Bangladesh, one in the UK) in which critiques of ISDS as neoliberal/neo-imperial appear to have analytical purchase, but where the tendency for these critiques to point towards a future in which sovereignty is 'reclaimed' proves both disquieting and untimely. In the Bangladesh case, it is shown that an excess of territorialised sovereign violence and authority already accompanies the operation of international investment law, while in the UK case a contemporary politics of 'reclaimed sovereignty' runs up against attempts to project such reclamation as the basis for an emancipated future outside the EU.

D. Bangladesh and the tragedy of sovereignty

In this section, I draw on ethnographic research carried out in Bangladesh with lawyers and activists concerned with geo-economic sovereignty and the outcomes of ISDS proceedings between Bangladesh (or Bangladeshi parastatals) and international oil, gas and mining corporations. The Bangladesh case is instructive for thinking about the tragic aspect of the pursuit of sovereignty and the critique of international investment law as a hybrid product of neoliberalism and neo-imperialism. In part, this is because Bangladesh has been subject to an unusually high number of extractive industry-based ICSID arbitrations for a country with such a small oil, gas and mineral export economy.⁴⁶ Additionally, although the impact of BITs with ISDS provisions on actual flows of Foreign Direct Investment (FDI) remains contested by both advocates and critics of international investment law, Bangladesh appears to be one of just a few countries in which BITs *do* have the effect of providing reassurances that increase inward investment.⁴⁷ Furthermore, significant figures in the Third World jurists movement, such as Kamal Hossain, have been (and continue to be) involved in representing Bangladesh in ICSID tribunals and training a new generation of international investment lawyers in Dhaka. Hossain was responsible not only for authoring the

⁴⁶ A Parra *The History of ICSID* (Oxford UP, 2012) xvi-xxxiv. Notable cases include *Scimitar Exploration Limited v Bangladesh and Bangladesh Oil, Gas and Mineral Corporation [Petrobangla]* ARB/92/2 (1992); *Scimitar S.p.A v People's Republic of Bangladesh* ARB/05/7 (2005); *Chevron Bangladesh Block Twelve, Ltd. And Chevron Bangladesh Blocks Thirteen and Fourteen Ltd. v People's Republic of Bangladesh* ARB/06/10 (2006) and the series of arbitrations taking place since 2011 between Bangladesh/Petrobangla and Niko Resources (Bangladesh) Ltd., the subsidiary of a Canadian exploration firm.

⁴⁷ C Peinhardt & T Allee 'Failure to deliver: the investment effects of US preferential economic agreements' 35 *The World Economy* (2012) 757.

constitution of independent Bangladesh, but also for designing their first Production Sharing Contract (PSC).

The PSC model was adopted in Bangladesh precisely to counter the inequities of colonial concessions, and reflects Hossain's engagement with the Third World jurists' movement and the call for Permanent Sovereignty over Natural Resources that took place during the 1960s and 1970s.⁴⁸ The occasional willingness of the Bangladeshi state (and its parastatal extraction company Petrobangla) to hold out against multinationals' demands for investor friendly PSCs reflects, perhaps, the residue of this Third World jurists' or 'Bandung spirit'.⁴⁹ Similarly, activist lawyers linked to the Bangladesh Environmental Lawyers Association have also utilised a constitutional provision (article 143) which vests in the Republic 'all minerals and other things of value underlying any land of Bangladesh' to contest the excessively favourable terms under which gas fields appear to have been allocated to (allegedly negligent) foreign exploration firms.⁵⁰

However, Bangladesh has also been subject to a number of 'investment climate reform' initiatives which might be understood as reflecting the imperatives of neoliberal international investment law, concerned as they are with promoting competitiveness, increasing investor confidence, and removing barriers to FDI.⁵¹ One such initiative, backed by the International Finance Corporation (IFC) and the UK's Department for International Development (DFID) has involved increasing arbitration capacity in Bangladesh—partly as a response to the access to justice issues caused by a significant backlog in domestic cases (particularly relating to land disputes) and partly to increase the confidence of foreign investors in Bangladesh's investment climate. This initiative, the Bangladesh International

⁴⁸ K Hossain 'Introduction' in K Hossain and S Chowdhury (eds) *Permanent Sovereignty over Natural Resources in International Law* (Frances Pinter, 1983) ix, xi.

⁴⁹ An 'exploration strike' and the withdrawal of companies including Conoco Philips and Statoil from bidding for offshore oil and gas blocks appeared to be a response to the 2012 Model Production Sharing Contract, which overturned provisions in the 2008 Model PSC for an uncapped gas sale price and gas export.

⁵⁰ Bangladesh Writ Petition 6911 of 2005, p. 42.

⁵¹ These initiatives include the Bangladesh Investment Climate Fund (partly backed by the IFC, the World Bank's private sector arm), IFUSE (Investment Facility for Utilising UK Specialist Expertise) backed by the UK's Department for International Development (DFID), and the work of donor-backed funds designed to stimulate private investment such as PIDG (the Private Infrastructure Development Group, predominantly funded by DFID).

Arbitration Centre (BIAC) was established in 2013 as an arbitration forum and a training centre for a new generation of Dhaka-based arbitrators.

With jurists and arbitrators like Kamal Hossain in attendance, questions at one of the first BIAC training sessions⁵² in 2013 turned to rulings that had taken place in controversial ICSID tribunals like *Saipem S.p.A. v. Bangladesh* (ARB/05/7). In 1990, because of local opposition, delays to the building of a pipeline resulted in the Italian firm Saipem triggering the arbitration clause in their original agreement with Bangladesh and an initial arbitration in Dhaka under International Chamber of Commerce (ICC) rules in 2000. When the ICC tribunal denied a series of procedural requests by the Bangladesh parties (pertaining to comments being made public or removed from the record) the Supreme Court in Dhaka issued an injunction against the continuation of tribunal. The ICC tribunal nonetheless issued an award in 2003, ruling that Saipem had suffered a breach of contract when they were not compensated for the time lost due to the local opposition. Petrobangla appealed to the Supreme Court, whose ruling was that no award existed, because the ICC had ignored their earlier ruling: the award did not exist and could not be enforced. At this point, in 2004, Saipem filed a request for arbitration with the Government of Bangladesh at ICSID.

The ICSID award treated the rights to the ICC arbitral award as an investment, and the court's decision to set it aside as an act of expropriation. Such expansive interpretations of investment and expropriation are at the heart of the concerns that critics like Sornarajah and Prieto-Rios express about the neoliberal/neo-imperial character of aspects of international investment law. Cautioning against a retreat from internationalism, Hossain nonetheless argued to the trainees at the 2013 BIAC training events that ICSID kept giving 'investor-friendly awards' and would only respect courts that had 'earned respect by ruling against their own country'.⁵³ Indeed, when I interviewed the IFC's arbitration trainers after the BIAC event in 2013, they expressed a conviction that international investors would be unlikely to use BIAC, because they 'want a panel that is not all composed of Bangladeshis'. Echoing Díez-Hochleitner and Remón's view that arbitration is a civilizing practice and

⁵² During which I was in attendance. Follow-up interviews were subsequently carried out with local and international (IFC) lawyers, trainers and trainees. Much of the remainder of this section draws on this material.

⁵³ Author's fieldnotes, September 2013.

Anghie's critique of this 'civilizing mission', the trainers described themselves as being in Bangladesh to 'spread the rule of law, in a very American way'.⁵⁴

In a follow-up interview, Hossain described the Saipem case as a scandal: 'There was this big bleating of the company that "the national courts didn't suit us", and now the ruling is cited boldly, though in international circles all of those agree this is absolutely outrageous'.⁵⁵

Hossain was certainly correct: the ruling is cited boldly by political risk analysts and international investment lawyers, as I discovered while carrying out a series of observations in London at UK government-funded export promotion agencies from 2013-2015. *Saipem v. Bangladesh* was singled out by trainers as an example of the creative possibilities afforded by international investment law. These training sessions reflected a definitive 'pro-business' approach to international investment law, one that encourages antipathy towards the exercise by post-colonial states (frequently treated as suspect by default) of regulatory powers likely to result in reduced future earnings for foreign corporations.⁵⁶

Critiques of ISDS and the practice of international investment law as neoliberal and neo-imperial both appear relevant to the Bangladesh case. The neoliberal and the neo-imperial appear to intertwine in the donor-funded efforts to promote attractive investment climates conducive to investor protection and in the attitudes of IFC trainers and UK-based legal advisers towards arbitration as a tool for creatively extracting revenue and circumventing the courts in (putatively sovereign) post-colonial states.⁵⁷ But, as argued above, the critiques of ISDS as neoliberal and neo-imperial share a concern with sovereignty, in particular with the loss of sovereignty. The anticipated future conjured by these critiques is, then, one in which sovereignty is reclaimed, or at least flows elsewhere, away from markets and corporations towards states and the populace. As I have argued throughout this essay, there

⁵⁴ P Gilbert 'Speculating on Sovereignty: Money Mines and Corporate Foreign Policy at the Extractive Industry Frontier' (under review).

⁵⁵ Interview with author, December 2013.

⁵⁶ See P Comeaux & N Kinsella 'Reducing political risk in developing countries: bilateral investment treaties, stabilization clauses, and MIGA & OPIC investment insurance' 15 *New York Law School Journal of International and Comparative Law* 3. For more recent examples, see Schlemmer (2016) 190, 192; also M Kantor 'Indirect expropriation and political risk insurance for energy projects' *Journal of World Energy Law and Business* 8 (2015) 173.

⁵⁷ As Michael Goldhaber notes, *Saipem* effectively overruled the Bangladeshi courts and 'performed the role of an appellate chamber', even if the arbitrators claimed the opposite. M Goldhaber 'The rise of arbitral power over domestic courts' 1 *Stanford Journal of Complex Litigation* (2013) 373, 389.

is something *untimely* and *tragic* about this form of critique. The Bandung spirit, which animated calls for Third World sovereignty against the totalising project of colonial domination, now lies if not in ruins, then at least ‘fragmented’.⁵⁸

In the specific case of Bangladesh, the Bandung spirit had evaporated prematurely as India and Pakistan were drawn into Cold War affiliations that determined the shape of Bangladesh’s liberation struggle in 1971. Moreover, Third World support for the sovereignty of Bangladesh was muted by a commitment to non-interference.⁵⁹ Nevertheless, here we can see, in David Scott’s terms, that future -to which anti-colonial critiques oriented towards (re)claiming sovereignty once spoke- has now become our fragmented present. Thus, continued calls for sovereignty made against the neo-imperialism of international investment law possesses a tragic quality.⁶⁰ Similarly, critiques of international investment law as neoliberal -while not without purchase on projects to build arbitration capacity for the benefit of foreign investors- also point towards a future in which sovereignty flows away from markets and corporations, towards states and the people. But such critiques are possessed of an equally tragic quality, which comes all too clearly into view when the operation of sovereign authority is examined more closely in relation to Bangladesh’s resource politics.

On 26th August 2006, a protest against a proposed open-pit coal mine at Phulbari, in north-west Bangladesh, resulted in the death of five people when security forces opened fire on the crowd marching towards the local office of Asia Energy, a wholly-owned subsidiary of the London-listed junior GCM Resources. The protest centred on the possibility that the mine would displace between 40,000 and half a million people; seriously impact upon the local water table; and compensate displaced residents with cash that would hardly make amends for the hardships that come with landlessness in rural Bangladesh.⁶¹ Those who lost

⁵⁸ V Kanwar ‘Not a Place but a Project: Bandung, TWAIL, and the Aesthetics of Thirdness’ in L Eslava, M Fakhri and V Nesia (eds) *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge, 2017).

⁵⁹ C Chowdhury ‘From Bandung 1955 to Bangladesh 1971: Oppressed Populations, Self-Determination and Third Worldist Failures in South Asia’ in L Eslava, M Fakhri and V Nesia (eds) *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge, 2017).

⁶⁰ Scott (2004, 2014).

⁶¹ S Numerowla ‘Land, place and resistance to development in Phulbari, Bangladesh’ *SAMAJ* (2016) available at <https://samaj.revues.org/4113> (Last visited 5 October 2017).

their lives are now commemorated annually on Phulbari Day as martyrs, by the *tel-gas samiti* (National Committee), a coalition of left-wing organisations and academics opposed to foreign ownership of Bangladeshi resources. The legality of the still-stalled Phulbari project is contested by a number of activists, including one senior figure in the National Committee who claims that a document signed by a then-government minister has rendered the project invalid.⁶²

More recently, the National Committee has been active in mobilising against the Rampal Power Plant, a coal-fired plant under construction in the UNESCO World Heritage Site of the Sundarbans. Imagery deployed in the marches mobilised against Rampal have reflected concerns over the involvement of India's National Thermal Power Corporation in the construction of the project,⁶³ framed as a potential threat to Bangladesh's economic sovereignty. Another coal-fired power plant to be built as a partnership between a politically influential Bangladeshi energy firm and a Chinese power group, at Banshkhali, was again the site of shootings in 2016, resulting in the death of four protestors opposing the lack of consultation and the possibility of displacement.⁶⁴

What sense does it make to speak of a loss of sovereignty in this context? Certainly, Anghie and Sornarajah's critique of international investment law—as a system predicated on designating the 'uncivilized other', de-recognising their formal sovereign authority and only re-instating that recognition upon the granting of extraction and trading rights to foreign corporations—has purchase in the Bangladesh case. But from the perspective of those who understand sovereignty as a 'tentative and always emergent form of authority grounded in violence,'⁶⁵ the shootings in Phulbari and Banshkhali can *also* be understood as sovereign outbursts. Certainly, these shootings are hardly evidence of a lack or loss of sovereignty by the post-colonial Bangladeshi state. These were acts perpetrated by state forces, albeit within a framework 'configured not simply by an absence of connection, power and capital,

⁶² 'When a minister signs something, it is official and unless the next government reverses that it must be followed' (Interview, November 2013).

⁶³ P Gilbert 'Crowds, Courts & Corporations: Capitalizing on Varieties of Sovereignty in Bangladesh's Extractive Industries' (2017) Paper presented at Utrecht University, April 26.

⁶⁴ C Kotikalapudi 'Corruption, crony capitalism and conflict: rethinking the political economy of coal in Bangladesh and beyond' (2017) 17 *Energy Research & Social Science* 160.

⁶⁵ Hansen & Stepputat (2006).

but by a particular form and experience (conceivably a *surplus*) of these'.⁶⁶ For some, the Bangladeshi state's willingness to exercise 'sovereignty as domination' (in some cases, in support of the apparent interests of foreign resource investors) reflects a paternalistic form of authority designed to 'protect the masses from their own unruly nature.'⁶⁷ But to view this polity willing to dominate its citizenry (sometimes configured by a surplus of corporate power) as that within which sovereignty may be restored or re-embedded is, arguably, to confuse the expression of anticolonial desires for national independence with the form that contemporary projects of emancipation ought to take.

E. Sovereignty after neoliberalism: Anti-ISDS activism in Europe

In this final section, I move to the European context to look at the manner in which critiques over TTIP and ISDS have been articulated (or deflected). My intention is not to challenge the critiques made by legal scholars who identify ISDS with neoliberalism (or neo-imperialism), and it is certainly not to defend the justifications provided by scholars, policymakers and legal practitioners sympathetic to ISDS and its original inclusion in the TTIP negotiations, prior to the EU's move to establish a multi-lateral investment court in its stead. Indeed, as I demonstrate below, many aspects of the rationale outlined by defenders of TTIP and ISDS fit rather neatly into the Foucauldian conception of neoliberalism advanced by legal scholars like Schneiderman and Prieto-Rios and the broader understanding of neoliberalism proffered by sociologists like Davies. But when politicians apparently hostile to the neoliberal 'disenchantment of politics by economics',⁶⁸ and populist movements which privilege sovereignty over market function, gain significant support in the traditional Anglo-American strongholds of neoliberalism, calls for more sovereignty begins to look more like tragedy than political romance.

ISDS is certainly not the only grounds on which protest against TTIP has been organised. The mid-2016 TTIP leaks showed at least some of the consumer safety and health-related

⁶⁶ Sidaway (2003) 160, original italics.

⁶⁷ N Chowdhury 'Picture Thinking: Sovereignty and Citizenship in Bangladesh' 87 *Anthropological Quarterly* (2014) 1257, 1258.

⁶⁸ Davies (2014) 4.

concerns articulated in social protest against TTIP to be well-founded, and these replaced ISDS in many activists' priorities. Nonetheless, the arguments made in favour of ISDS by pro-TTIP academics are worth evaluating in light of the critiques of ISDS as neoliberal or neo-imperial discussed above. For its defenders like Pelkmans, TTIP would in fact have offered a 'much improved'⁶⁹ ISDS, a claim that is also made in relation to Christian Tietje and Freya Baetens' report on ISDS made to the Dutch Ministry of Foreign Affairs. There it was argued that 'the benefits of ISDS will outweigh the costs'.⁷⁰ This claim is enabled by the presentation of ISDS as a fundamentally neutral (if not positive) development in historical terms: the culmination of dispute resolution provisions that replaced diplomatic measures, emerging from Euro-American Treaties of Amity in the eighteenth century.⁷¹ There is no reference to the postcolonial critiques of international law that depict ISDS as an outcome of uneven encounters between Euro-American sovereigns and colonial or developing nations whose sovereignty was only recognised when it was partially relinquished. Tietje and Baetens were equally optimistic that new BITs can include exemption clauses for environmental and taxation clauses, and recommended including a statement in TTIP that parties should retain their right to regulate in areas where there might be public interest consequences.⁷² Elsewhere, Baetens argued that ISDS should not really be of any concern in terms of 'limiting the policy space', since 'all obligations that a state undertakes "limit" its policy space: promising to do A may affect how one can do B'.⁷³

Such ahistorical and depoliticising accounts of the norms of arbitration perpetuate precisely the vision of international investment law which the anti-neoliberal and anti-imperial critiques outlined above take as their object. On the one hand, Tietje and Baetens' account

⁶⁹ J Pelkmans 'TTIP: Definition, Rationale and Significance' 6 *Intereconomics* (2015) 312, 315-316.

⁷⁰ C Tietje & F Baetens 'The impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership'. Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands (2014) (MINBUZA-2014.78850) 8. Cost-Benefit analysis is frequently depicted as a quintessentially neoliberal technique, allowing as it does the evaluation of different policy proposals on competitive, marketised lines. However, as Samuel Knafo and colleagues argue, such techniques owe less to the 'free market' prescriptions of neoliberal ideologues like Hayek and Friedman, and more to the innovations in *managerial* technique incubated by the RAND Corporation. S Knafo, S Dutta, R Lane & S Wyn-Jones 'The managerial lineages of neoliberalism' *New Political Economy*, forthcoming.

⁷¹ Tietje & Baetens (2014) 15-20.

⁷² Ibid 105.

⁷³ F Baetens 'Transatlantic Investment Treaty Protection—A response to Poulsen, Bonnitcha and Yackee' In D Hamilton & J Pelkmans (eds.) *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership* (Rowman & Littlefield, 2015) 187, 197.

continues the long Euro-American history of treating Third World sovereignty as conditional, subject only to the foreigner's right to trade. The spirit of Bandung and the efforts of the TWAIL and Third World jurists to shape another international investment law -rather than merely 'enter' European-derived international investment law- disappear in their analysis. On the other hand, the flattening of all public commitments into limitations on possible policy space works as 'an effective means for shielding the economic sphere from the potential hazards of regulation and redistribution'.⁷⁴ But it is when these critiques are harnessed to images of neoliberalism as a *constraint* on 'good' sovereignty that problems arise, and their untimely, tragic tenor is brought into focus.

Influential scholar-activists critical of TTIP and its ISDS provisions have shared a great deal with the legal and sociological critiques of neoliberalism outlined above. For critics of TTIP, the negotiations around regulatory cooperation generated concerns over the prospect of a 'race to the bottom' in a variety of health, environmental and food standards, while the inclusion of ISDS in negotiations about the rules governing the Partnership meant 'TTIP [was] likely to undermine national sovereignty'.⁷⁵ Susan George, influential among many TTIP activists in the UK, articulated her concern with TTIP on the basis that it furthered the neoliberal rise of shadow sovereigns, whereby 'the functions of legitimate government are progressively being taken over by illegitimate, unelected, opaque agents and organisations'.⁷⁶ On ISDS, George charged, 'The EU obviously accepts this denial of sovereignty and affront to democratic institutions as A Good Thing'.⁷⁷

If the denial of sovereignty is the form taken by domination, then reclamation of that sovereignty is conjured as the form that revolution or vindication must take. But calls for reclamations of sovereignty were forthcoming from other quarters between 2014-16, causing significant friction between pro- and anti-Brexit TTIP activists in the run-up to the June 2016 referendum in the UK.⁷⁸ Indeed, following the immediate aftermath of the Brexit

⁷⁴ Hirschl (2004) 153.

⁷⁵ G Moody 'You thought ISDS was bad? TTIP's "regulatory cooperation" is even worse' 19 January 2016, available at <http://arstechnica.co.uk/tech-policy/2016/01/you-thought-isds-was-bad-ttips-regulatory-cooperation-is-even-worse/> (last accessed 05 October 2016).

⁷⁶ S George *Shadow Sovereigns: How Global Corporations are Seizing Power* (Polity, 2015) 5.

⁷⁷ Ibid 95.

⁷⁸ Based on personal observations and participation in anti-TTIP campaign groups based in London.

vote, one of the editors of their earlier 2007 volume, *Politics without Sovereignty* (whose argument was that the ‘shared antipathy towards a final authority in politics’ unified all strands of international relations and law scholarship, enabling the transformation of governance into ‘dreary administration’ in the absence of ‘ideologically charged party politics’)⁷⁹ proclaimed the referendum’s outcome as a vindication for their theoretical position.⁸⁰ The sovereignty mourned by the contributors to this volume was not absolutist ‘Westphalian’ sovereignty, but the notion that government should ‘flow from the will of the people’. Without sovereignty there would be only the ‘merely mechanical in social development’ and no ‘robust, determined political individuals, pursuing their idea of the good life in a more rational social order’.⁸¹

Recalling Will Davies’ understanding of neoliberalism as an attempt to retain the liberal commitment to uncertain outcomes (ostensibly ensured by market-type competition) and rejecting the politics of planning so loathed by Hayek, this argument *for* sovereignty appears to be an argument *against* neoliberalism. In the context of the European project, it was argued by contributors to *Politics without Sovereignty* that the neoliberal settlement in the European Union was the outcome of a ‘struggle by the elites to reduce public expectations upon the state’ that was ‘too successful’, leading to a situation where ‘elites also recoil from responsibility for political decision-making’.⁸² Several political economists more critical of the Brexit vote also viewed it as an outburst of sovereign expression, equivalent to a Polanyian re-embedding of economy in society, as ‘an inchoate and incoherent attempt to subordinate unfettered globalised markets in money, trade, and labour to the interests of British society’.⁸³ But we should perhaps take a pause given the violent, exclusionary politics that have accompanied what might seem at times like an anti- or post-neoliberal turn

⁷⁹ C Bickerton, P Cunliffe & A Gourevitch ‘Introduction: the unholy alliance against sovereignty’ In C Bickerton, P Cunliffe and A Gourevitch (eds.) *Politics without Sovereignty: a Critique of Contemporary International Relations* (Taylor & Francis, 2007) 1, 3-4. See also Hansen & Stepputat (2006) 295, 296.

⁸⁰ P Cunliffe ‘If you want to understand popular sovereignty and why it matters, read this: #Brexit #referendum #EU’ 28 June 2016, available at <https://twitter.com/thephilippics/status/747790095470723072> (Last visited 13 November 2016).

⁸¹ Bickerton, Cunliffe & Gourevitch (2007) 11-13.

⁸² J Heartfeld ‘European Union: a process without a subject’ In C Bickerton, P Cunliffe and A Gourevitch (eds.) *Politics without Sovereignty: a Critique of Contemporary International Relations* (Taylor & Francis, 2007) 131, 146-147.

⁸³ A Pettifor ‘Brexit and its Consequences’ 14 *Globalizations* (2017) 127, 131. Also J O’Reilly ‘The Fault Lines Unveiled by Brexit’ 14 *Socio-economic Review* (2016) 807.

towards economic nationalism and protectionism on both sides of the Atlantic.⁸⁴ In such a context, critiques of contemporary trade agreements and ISDS as neoliberal are in danger of finding their answer exhausted, or even pre-empted by a politics to which few of these critics would subscribe.

F. Conclusion

Drawing on ethnographic fieldwork carried out in Bangladesh and analysis of anti-TTIP activism in the UK, this essay has interrogated the work that 'sovereignty' does in anti-neoliberal and postcolonial critiques of ISDS. It has identified a tendency to present critiques of ISDS (and international investment law more broadly) as a fundamentally neoliberal formation that privileges the sovereign authority of corporations and of market rule itself, and/or as a product of neo-imperial international law that discounts the sovereign authority of post-colonial jurisdictions where their decisions threaten the profitability of transnational corporations.

The essay does not challenge these critiques as they shed light on the *operations* of international investment law. Indeed, the examples from Bangladesh (the use of ISDS as an appellate court in *Saipem*) and the UK (in economists' approach to ISDS as narrowing the policy space like any other measure) seem to substantiate these critiques. But, drawing on David Scott,⁸⁵ I am concerned with the temporal mismatch between modes of critique formulated in response to a particular historical juncture and their articulation in the present. If anti-colonial and Third World critiques of international investment law identified as their problem an unequal system that designated certain jurisdictions uncivilized and unworthy of sovereign authority in their dealings with transnational corporations, then decolonisation and reclaimed national sovereignty emerged clearly as solutions. Likewise, if

⁸⁴ Mitropoulos in fact cautions against reading populist and protectionist politicians as 'post-neoliberal', arguing that the neoliberal project never did entail deregulation or a dis-embedding of markets, but always an intensification of control over borders, gender relations, marriage and the administration of household economies. Nonetheless, arguments that take neoliberalism to be 'dis-embedded' and call for 're-embedding' as an answer to that critique fail to point towards a future beyond the current, often regressive, political moment. A Mitropoulos "'Post-factual' readings of neoliberalism, before and after Trump' *Society & Space* (2016) available at <http://societyandspace.org/2016/12/05/post-factual-readings-of-neoliberalism-before-and-after-trump/> (Last visited 7 Feb 2018).

⁸⁵ Scott (2004, 2014).

critiques of ISDS as fundamentally neoliberal see its support for ‘market rule’ through the denial of state sovereignty as the problem, then the re-embedding of economic activity in a reclaimed state or popular sovereignty emerges as the solution. In both cases presented here—the postcolonial state which is undermined by the same extractive corporations to which it provides violent support in Bangladesh, and the regressively re-embedded context in the UK—the futures to which these critiques point have now been left behind, and calls for reclaimed sovereignty of the putatively good kind appear tragically untimely. As we begin to discover what comes after neoliberalism, and when postcolonial nation-states exercise hard-won formal sovereignty authority by entering into fragmented alliances with violently extractive corporations, the problem-space of international investment law is necessarily shifting, even if the futures to which our critiques must point have not yet come into view.